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PURPOSE

This transmits a complete reprint with changes for IRM 4.72.9, Employee Plans Technical Guidance, Qualified Joint and Survivor Annuity Requirements.

BACKGROUND

IRM 4.72.9 provides guidance for examining employee plans subject to qualified joint and survivor annuity requirements.

NATURE OF CHANGES

This manual transmittal reissues existing procedures in the new IRM format. IRM 4.72.9 replaces procedures at IRM 7.7.1, Chapter 9, using the same catalog number. These procedures have been updated to include legislative and regulatory changes.

INTENDED AUDIENCE

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4.72.9.1 (03-01-2002)

Overview

- (1) Guidance is provided on examining plans subject to the joint and survivor annuity requirements.
- (2) These guidelines reflect the legislative changes made by the Small Business Job Protection Act of 1996, P.L. 104-188 (SBJPA) and the Taxpayer Relief Act of 1997, P. L. 105-34 (TRA of 1997).

4.72.9.1.1 (03-01-2002)

Legislative History

- (1) The Retirement Equity Act of 1984 (REA) amended the Employee Retirement Income Security Act of 1974 (ERISA) to introduce mandatory spousal rights in pension plans so the choice of the form of benefit received from a pension plan was no longer solely the participant's choice. The legislative history of REA reflects that Congress viewed the marriage relationship as a partnership, and the retirement benefit resulting from that partnership as derived from the contributions of both partners. Prior to REA's enactment, the spouse of a plan participant had very few rights to share in that participant's pension benefit.
- (2) REA greatly augments the nonemployee spouse's interests by creating the right to choose a survivorship annuity as the form in which benefits are distributed from the plan.
 - a. If the participant survives until retirement age, REA generally requires that the participant's annuity be a qualified joint and survivor annuity (QJSA) , under which payments continue for the lives of both the employee and the nonemployee spouse.
 - b. If the participant dies before retirement and is vested, REA makes the nonemployee spouse a plan beneficiary, with an interest called a preretirement survivor annuity (QPSA) which survives the participant's death.
 - c. These automatic forms of benefit may be waived by the nonemployee spouse.
- (3) REA added IRC section 417 and amended IRC section 401(a), effective for the first plan year beginning in 1985. Technical and other corrections were made to REA by the Tax Reform Act of 1986 (TRA'86). Final regulations provided additional guidance and were effective 8/22/88. Updates to final regulations and additional proposed regulations were issued in 2000 and 2001 to reflect changes made by SBJPA and TRA of 1997.

4.72.9.2 (03-01-2002)

Plans Covered by Survivor Annuity Requirements

- (1) The QJSA/QPSA requirements apply to all defined benefit plans and any defined contribution plan to which IRC section 412 applies (which includes money purchase plans but exclude profit-sharing plans). See IRC section 401(a) (11).
- (2) These requirements also apply to certain plans subject to Title I of ERISA.

- a. The requirements apply to some IRC section 403(b) annuity arrangements but not to Individual Retirement Annuities (IRAs) or Simplified Employee Pensions (SEPs). See Reg. 1.401(a)-20, Q&A 3(d).
- b. The requirements also apply to other defined contribution plans (i.e., profit-sharing and stock bonus plans) unless those plans satisfy the conditions delineated in IRC section 401(a) (11) (B) (iii).

4.72.9.2.1 (03-01-2002)

**IRC Section
401(a) (11) (B)
(iii)**

- (1) IRC section 401(a) (11) (B) (iii) provides that the—
 - a. Participant's spouse must be entitled to the full nonforfeitable account balance upon the participant's death;
 - b. Plan does not offer a life annuity, or the participant does not elect a life annuity; and
 - c. Plan with respect to a participant is not a transferee plan that is subject to the survivor annuity requirements or that there is an acceptable separate accounting between transferred benefits and any other benefits under the plan.

Note: For purposes of the two conditions in b. and c. above, the QJSA and QPSA rules may apply to some participants and not others.

- (2) Defined contribution plans will not be treated as meeting the first condition above unless two additional conditions are satisfied. See Reg. 1.401(a) -20, Q&A 3(b).
 - a. The benefit must be made available to the surviving spouse within a reasonable time. If the benefit is made available within the 90-day period following the date of death, this is deemed a reasonable period. A time period greater than 90 days will be deemed unreasonable if it is less favorable to the surviving spouse than any period that is applicable to other distributions under the plan.
 - b. The benefit payable to the surviving spouse must be adjusted for gains or losses that occur after the participant's death but prior to distribution in accordance with the plan's rules governing the adjustment of account balances for other distributions from the plan.

4.72.9.2.2 (03-01-2002)

**Transferee
Plans**

- (1) Although the QJSA and QPSA requirements generally do not apply to defined contribution plans that are not subject to IRC section 412, these requirements will apply if the defined contribution plan is a transferee plan. See Reg. 1.401(a) -20, Q&A 5. The transferee plan rules apply with respect to specific participants, not necessarily the whole plan, although the plan's language must provide QJSA/QPSA provisions for such participants.
 - a. A defined contribution plan is a transferee plan with respect to any participant if it holds a participant's benefit that was directly or indirectly transferred to it after 1/1/85, by a defined benefit plan, is a defined contribution plan subject to IRC section 412 or a defined contribution plan that is subject to the survivor annuity rules of IRC

section 401(a) (11) and IRC section 417 with respect to that participant. If a plan not subject to such rules is involved in a transaction such as a merger or spinoff that has the effect of a transfer of benefits subject to the survivor annuity rules, then such benefits will be subject to such rules.

- b. A rollover contribution (including a direct rollover) is not a direct or indirect transfer that would cause the survivor annuity requirements to apply.
- (2) Offset plans are transferee plans. If a participant in a defined benefit plan has his benefit offset by his account balance in a plan not otherwise subject to the survivor annuity requirements, such as a profit-sharing or stock bonus plan, the profit-sharing or stock bonus plan is subject to the survivor annuity rules with respect to that participant. See Reg. 1.401(a)-20, Q&A 5.
 - (3) The survivor annuity requirements apply to all accrued benefits held for a participant for whom the plan is a transferee plan unless there is an acceptable method of accounting that tracks the transferred benefits with respect to all other benefits under the plan. See Reg. 1.401(a)-20, Q&A 5 (b).
 - a. To be an acceptable method of accounting all gains, losses, withdrawals, contributions, forfeitures and other charges and credits must be allocated on a reasonable and consistent basis between the accrued benefits subject to the survivor annuity rules and other benefits.

4.72.9.2.3 (03-01-2002)
**Examination
Steps**

- (1) The agent should first determine whether the plan is subject to IRC section 412.
- (2) If the plan is subject to IRC section 412, the agent should determine whether such plan provides for QJSAs and QPSAs. If the required survivor annuity language is not found, the plan is disqualified.
- (3) If IRC section 412 does not apply to the plan, determine whether the plan provides for the full nonforfeitable account balance of any deceased participant to be paid to the participant's spouse or that it will be paid to another beneficiary only with spousal consent.
- (4) If a plan that is not subject to IRC section 412 has become a transferee plan, determine whether there is an acceptable separate accounting for transferred assets. If there is not an acceptable separate method of accounting, determine whether the plan has made all benefits subject to the survivor annuity requirements.
- (5) If a plan that is not subject to IRC section 412 offers payment of benefits in the form of a life annuity, and a participant elects a life annuity, determine whether the annuity is a QJSA and whether its election meets the spousal consent requirements.

4.72.9.3 (03-01-2002)

Consent Requirements

- (1) A plan is prohibited from distributing any portion of a participant's accrued benefit once the benefit is immediately distributable (i.e., prior to the later of the participant attaining normal retirement age or age 62), unless the participant (and where applicable, the spouse) consents. See IRC section 411(a) (11) and IRC section 417(e) (1). Also see Reg. 1.411(a)-11(c) (4) and 1.417(e)-1(b).
- (2) A participant's consent is necessary when payments are immediately distributable, but when payments are no longer immediately distributable, consent to payment of benefits in the form of a QJSA is not needed. See Regs. 1.411(a)-11(c) (4) and 1.417(e)-1(b).

4.72.9.3.1 (03-01-2002)

Participant Consent Rules

- (1) IRC section 411(a) (11) requires a participant's consent before a plan makes most forms of distributions to the Participant. Thus, for a plan subject only to IRC section 411(a) (11) (and not IRC section 417), no spousal consent is required. Thus, for profit-sharing and stock bonus plans not subject to IRC section 417, the only spousal consent required is if the participant wants the nonforfeitable account balance to go to someone other than the spouse.
- (2) A participant's consent is valid if, the participant receives a description of the material features of the optional forms of benefit available under the plan. The participant must also be informed of his right, if any, to defer receipt of the distribution.

4.72.9.3.2 (03-01-2002)

Significant Detriment

- (1) A participant's consent to a distribution is not valid if a significant detriment is imposed under the plan on the participant for not consenting to a distribution. See Reg. 1.411(a)-11(c) (2). A significant detriment is created where a participant electing to defer receipt of a distribution is treated less favorably than other plan participants.
- (2) The determination of what is a significant detriment to the participant is a facts and circumstances determination.
 - a. One factor to consider would be whether the employer has a valid business reason for the disparate treatment between former participants and active participants.
 - b. For example, an employer may decide to allow plan loans only for active participants because of the difficulty of insuring repayments of loans by former participants once payroll deductions cannot be used.
- (3) An example of disparate treatment that results in a significant detriment for participants:
 - a. A defined contribution provides that a participant who has not terminated employment can choose the manner in which his or her account is invested among a broad range of investment alternatives with materially different risk and return characteristics. However, the plan provides that upon termination of employment the participant may no longer choose among the investment alternatives and the

participant's account is automatically invested in the money market fund until it is distributed to the participant. Under these facts and circumstances there is a significant detriment imposed by the plan on a participant that does not consent to a distribution. See Rev. Rul. 96-47, 1996-2 C.B. 35.

4.72.9.3.3 (03-01-2002)

Exceptions to Participant Consent Rules

- (1) There are several exceptions to the participant consent requirements.
 - a. For distributions made on or after October 17, 2000, a participant is not required to consent if the present value of his nonforfeitable accrued benefit, including both employer and employee contributions, on the date of the distribution is equal to or less than \$5,000 (the cash out limit). See Reg. 1.411(a)-11(c) (3).

Note: TRA of 1997 increased the cash out limit from \$3,500 to \$5,000. Also, prior to the issuance of the temporary and proposed regulations on December 21, 1998, the regulations had provided that if the present value determined at the time of a distribution to the participant exceeded \$3,500, then the present value of any subsequent distribution would be deemed to exceed \$3,500 (commonly referred to as the "lookback rule") . Final regulations issued on July 19, 2000, eliminated the lookback rule. Transition rules for distributions not subject to IRC section 417 are as follows: (1) for distributions prior to March 22, 1999, the lookback rule applies, (2) for distributions on or after March 22, 1999 but before October 17, 2000, the lookback rule is eliminated, except for distributions under an optional form where at least one scheduled periodic payment remains payable and the present value of the nonforfeitable accrued benefit at the time of the first distribution under that form exceeded the current cash out limit, (3) for distributions on or after October 17, 2000 the lookback rule is eliminated. See also IRM 4.72.9.3.5.1(1)a.

- b. Terminating profit-sharing and stock bonus plans that do not offer annuity options and that are not subject to the IRC section 417 requirements may distribute without participant consent if the employer and its controlled group maintain no other defined contribution plan other than an ESOP. See Reg. 1.411(a)-11(e)(1).
- c. It is not necessary for an employer to receive a participant's consent to make a distribution of ESOP dividends. See Reg. 1.411(a)-11(e) (2).
- d. Under Reg. 1.411(a)-11(c) (7), a minimum distribution as required by IRC section 401(a) (9) may be made without a participant's consent.

4.72.9.3.4 (03-01-2002)

Spousal and Participant Consent Coordination

- (1) IRC section 417 requires spousal consent in addition to participant consent for plans subject to IRC section 412, or profit-sharing plans with QJSAs.
 - a. Spousal consent is required for any distribution prior to the date the distribution is immediately distributable (i.e., the later of age 62 or the normal retirement age).

- b. After that date, the plan may make distributions in the form of a QJSA without participant or spousal consent, but spousal consent is required for any other form of benefit. See Regs. 1.411(a)-11(c) (4) and 1.417(e)-1(b).

4.72.9.3.5 (03-01-2002)

Spousal Consent Rules

- (1) REA added the requirement of spousal consent before a participant may take a distribution so that the nonemployee spouse would have some control over the form of benefit chosen by the participant and would at the very least be aware that retirement benefits existed.
 - a. Spousal consent is not necessary for distributions made in the form of a QJSA. See Reg. 1.401(a)-20, Q&A 17.
 - b. Spousal consent is required by law at all times for payment of benefits in a form other than a QJSA, even when payments are no longer immediately distributable.

4.72.9.3.5.1 (03-01-2002)

Exceptions to Spousal Consent Rules

- (1) Exceptions to the above spousal consent rule are found in Regs. 1.417(e)-1(b) (2) and 1.401(a)-20, Q&A 27, and are as follows:
 - a. For distributions made on or after October 17, 2000, a spouse's consent is not required if the present value of the participant's nonforfeitable accrued benefit, including both employer and employee contributions, on the date of the distribution is equal to or less than \$5,000.

Note: See the Note after IRM 4.72.9.3.3(1)a. for background information on the changes made to the cash out rules by TRA of 1997 and IRS regulations. Transition rules for distributions subject to IRC section 417 are as follows: (1) for distributions prior to October 17, 2000, the lookback rule applies and (2) for distributions on or after October 17, 2000, the lookback rule is eliminated, but after the annuity starting date, consent is required for the immediate distribution of the present value of the accrued benefit being distributed in any form, including a QJSA and QPSA, regardless of the amount of such present value. See Reg. 1.417(e)-1(b) (2) (i).

 - b. If it is established to the plan administrators' satisfaction that there is no spouse or the spouse cannot be located.
 - c. If the participant has been abandoned (and the participant has a court order to this effect), or where the participant is legally separated.
 - d. In the case of an incompetent spouse the legal guardian can provide consent, even if the legal guardian is the participant.
 - e. Under Reg. 1.401(a)-20 Q&A 23, minimum distributions, as required by IRC section 401(a) (9), may be made without the spouse's consent.

4.72.9.3.5.1.1 (03-01-2002)

**Antenuptial
Agreements**

- (1) An antenuptial agreement or any type of agreement entered into prior to the marriage does not satisfy the consent requirements. This is true even if the agreements are executed within the applicable election period. See Reg. 1.401(a)-20, Q&A 28.
- (2) The effect of antenuptial agreements on the right to waive pension benefits was considered in several cases including, *Hurwitz v. Sher*, 982 F.2d 778 (2d Cir. 1992), cert. denied, 508 U.S. 912 (1993), and *Nellis v. Boeing Co.*, No. 911011, 15 E.B.C. 1651 (D.Kan. 5/8/92).
 - a. In both cases the courts found that the antenuptial agreements were not effective waivers of the spouse's rights to receive the deceased participant's benefit.
 - b. The courts noted that the agreements were not signed by the participant's spouse, but by the participant's fiancée. Also, the agreements were not in compliance with REA since they did not specify the nonspouse beneficiary who would receive the benefit.

4.72.9.3.6 (03-01-2002)

**Unmarried
Participant Rule**

- (1) Reg. 1.401(a)-20, Q&A 25 provides that plans subject to the survivor annuity requirements must meet those requirements with respect to all participants, including those who are not married. A QJSA for a participant who is not married is a life annuity.
- (2) An unmarried participant must be provided with a written explanation of the forms of benefit and a single life annuity unless another form of benefit is elected by the participant.
- (3) An unmarried participant is deemed to have waived the QPSA requirements. However, should the participant later marry, the deemed waiver is voided.

4.72.9.3.7 (03-01-2002)

**Examination
Steps**

- (1) For distributions after October 17, 2000 determine whether there were any single sum distributions of more than \$5,000 without participant and, where required, spousal consent. Determine whether there has been an immediate distribution of any amount to a participant after the annuity starting date without getting spousal consent. (For distributions prior to October 17, 2000 see the transition rules in the Notes after IRM 4.72.9.3.3(1)a. and IRM 4.72.9.3.5.1(1)a.)
- (2) Determine whether participants electing to defer receipt of a distribution have the same options available to other participants. If not, determine whether the unavailability of some options results in a significant detriment to the participants deferring receipt of distributions.
- (3) Determine, by looking at the consent forms of the participant and spouse, that any distribution made while the benefit is immediately distributable has the consent of the participant or the surviving spouse and is in the form of a QJSA or QPSA.

- (4) Determine, by looking at the plan's forms, whether the plan has obtained adequate written consent from a participant's spouse when a distribution from the plan is not in the form of a QJSA or QPSA. Check also to see whether the consent document is correct, in conformance with the plan document, and whether the distribution form is of a type permitted by the plan.
- (5) In the case of deceased participants, check whether such payments have actually been made to the participant's spouse or, with the spouse's consent, to the participant's designated beneficiary.
- (6) For single sum distributions, determine whether the participant and spouse were given the choice of a QJSA and that they waived it.
- (7) Determine whether distributions to unmarried participants were paid in the form of a life annuity, unless an appropriate election of another form of benefit was made by the participants.

Note: If any of the above rules are violated the plan is disqualified.

4.72.9.4 (03-01-2002)

Notice and Election Requirements

- (1) REA's notice rules are intended to insure participants and their spouses are made aware of their retirement benefit options, and the consequences of any elections they make concerning these options. This information is to be made available at a time when the consequences of the elections will be of immediate, rather than remote, concern to the participant and spouse, and at a time when they should best be able to make sound decisions concerning their retirement benefits. To achieve these goals REA requires that the participant and spouse receive two notices concerning retirement benefits before benefits commence under the plan.

4.72.9.4.1 (03-01-2002)

QJSA and QPSA Notice Rules

- (1) The QJSA and QPSA notices inform the participant and spouse of—
 - a. Their right to receive a QJSA and/or a QPSA or other optional forms of benefits,
 - b. The option of selecting alternate beneficiaries, and
 - c. The spousal consent requirements. See Reg. 1.401(a)-20, Q&A 36.

Note: Sample language for spousal consent to a participant's waiver of a QJSA or QPSA is provided in Notice 97-10, 1997-1 C.B. 370.

4.72.9.4.2 (03-01-2002)

Written Explanation of QJSA and QPSA

- (1) The employer must provide each participant with a written explanation of a QJSA which specifies the following. See IRC section 417(a) (3) (A).
 - a. Terms and conditions of the QJSA;
 - b. Participant's right to make, and the effect of, an election to waive the QJSA;
 - c. Rights of the participant's spouse; and

- d. Right of the participant to make, and the effect of, revoking an election.

Note: For plans subject only to IRC section 411(a) (11) requirements (and not subject to IRC section 417), final regulations were issued pursuant to TRA'97 (effective January 1, 2001) to reflect new technologies so that notices and consents for participants could be transmitted through electronic media. See Reg. 1.411(a)-11(f).

- (2) Comparable information must also be provided for the QPSA. See IRC section 417(a) (3) (B).
- (3) The general rule is that the explanation of the QPSA and QJSA must be provided before benefits commence under the plan.
 - a. Notice of a QPSA must be provided within the "applicable period." See IRM 4.72.9.4.4.
 - b. Generally, notice of a QJSA must be provided during a 60-day period between 90 and 30 days before the annuity starting date. See IRM 4.72.9.4.5.
- (4) In general, the opportunity to elect among the various plan options must be provided, in the case of the QJSA, within a 90 day period that ends on the annuity starting date, and, in the case of the QPSA, beginning on the first day of the plan year in which the participant attains age 35.

4.72.9.4.3 (03-01-2002)
**Notice of
Optional Forms
of Benefit**

- (1) The participant and spouse must be furnished with a description of the optional forms of benefits available under the plan. The description also should provide sufficient additional information to illuminate the significant differences between the optional forms.
 - a. The participant must be provided with a general description of the eligibility conditions and other material features of the optional forms of benefit and sufficient additional information to explain the relative values of the optional forms of benefit available under the plan (e.g., the extent to which optional forms are subsidized relative to the normal form of benefit or the interest rate used to calculate the optional forms). See Req. 1.401(a)-20, Q&A 36.
- (2) The notice must be written in nontechnical language. This means the notice must be clear and simple enough (but also complete enough) to insure that the participant and spouse have the information they need to make well-informed decisions. See Req. 1.401(a)-11(c) (3).
 - a. The regulations also give the participant and spouse a right that may be exercised only once to request a more specific explanation of their retirement benefits.
 - b. This request for additional information may be made at any time, and the employer's response, written in nontechnical language, must reach the person making the request within 30 days.

4.72.9.4.4 (03-01-2002)

**Applicable
Period for QPSA
Notice**

- (1) The “applicable period” for providing the QPSA explanation is defined in Reg. 1.401(a)-20, Q&A 35, as the later of:
 - a. The period which begins with the first day of the plan year in which the participant attains age 32 and ends with the last day of the plan year before the plan year in which the participant has his/her 35th birthday;
 - b. A reasonable period ending after the individual becomes a participant;
 - c. A reasonable period ending after the QPSA is no longer fully subsidized (if applicable); or
 - d. A reasonable period after IRC section 401(a) (11) first applies to the participant.
- (2) For QPSA purposes, a period will be deemed reasonable if the notice is provided by the end of a two-year period beginning one year prior to the event described in b., c. or d. above, and ending one year after that date.

Note: IRC section 401(a) (11) generally does not apply to a defined contribution plan that does not provide for a life annuity form of distribution and that makes the spouse the beneficiary upon the participant’s death. However, IRC section 401(a) (11) will be considered as “first applying” to such a plan when a benefit is transferred from a plan not subject to this section to a plan which is subject to this section, or at the time an election is made under such a defined contribution plan to receive an annuity.

- (3) If a participant separates from service with the employer before age 35, the first notice must be provided within a two year period beginning one year before the separation from service and ending one year after the separation. If a participant who has separated from service returns to employment, the employee is treated, for purposes of this notice, as if the employee is a brand new employee, and another applicable period must be determined.

4.72.9.4.5 (03-01-2002)

**Period for QJSA
Notice**

- (1) A plan must provide an explanation of a QJSA to a participant within a reasonable time prior to the annuity starting date. See IRC section 417(a) (3).
 - a. The general rule is that the plan must provide participants with a written explanation of the QJSA no less than 30 days and no more than 90 days before the annuity starting date.
- (2) Generally, the annuity starting date is after the date that the explanation of the QJSA is provided to the participant. However, SBJPA added Code section 417(a) (7) which allows a plan to provide a QJSA explanation after the annuity starting date (i.e., a retroactive annuity starting date).
 - a. Effective for plan years beginning after December 31, 1996, if a defined benefit plan provides and a participant elects, the QJSA explanation may be provided on or after the annuity starting date provided the required election period ends no earlier than 30 days

after the explanation is provided. See Reg. 1.417(e)-1(b) (3). Note that there is a special spousal consent rule if a spouse would receive less of a survivor annuity as a result of the participant's election of a retroactive annuity starting date. See Reg. 1.417(b) (3) (v) (A).

4.72.9.4.5.1 (03-01-2002)
**Exceptions to
General Period
for QJSA Notice**

- (1) In regulations finalized on December 18, 1998, an exception was made to the requirement that notice must be provided to participants no less than 30 days prior to the annuity starting date. The exception recognized that there may be situations where the general notice period is not required in order to avoid a delay in the commencement of distributions to participants. The regulations now generally allow distributions to commence, with spousal consent if required, in less than 30 days after the participant receives notice of distribution rights if the participant affirmatively elects to have the distribution commence. See Reg. section 1.411(a)11(c) (2) (iii) and 1.417(e)1(b) (3) (ii).
- (2) Effective September 22, 1995 a plan may permit a participant to elect (with spousal consent) a distribution even if the annuity starting date is less than 30 days after the participant received the written explanation if the:
 - a. participant is told he or she has the right to at least 30 days to consider whether to waive the QJSA and consent to a form of distribution other than a QJSA,
 - b. participant is permitted to revoke a distribution election during this period,
 - c. the annuity starting date is the date after the explanation was provided (but see exception in IRM 4.72.9.4.5(2) (a) above), and
 - d. distribution begins more than 7 days after the explanation was provided. See IRC section 417(a) (7) and Reg. section 1.417 (e)1(b) (3) (ii) (D).

Example: Employee E elects (with spousal consent) on December 2 to waive the QJSA and receives an immediate distribution in the form of a single life annuity. The plan may permit Employee E to receive payments with an annuity starting date of December 1, provided that the first payment is made no earlier than December 6 and the participant does not revoke the election before that date. Note that the plan can make the remaining monthly payments on the first day of each month thereafter in accordance with the regular payment schedule.

- (3) Final regulations, effective January 1, 2001, were issued pursuant to TRA'97, which provide an exception to the requirement that notice must be provided to the participant no more than 90 days prior to a distribution. A plan may give the full notice more than 90 days prior to the distribution if it provides a summary of the notice to the participant during the 90/30-day period. Additionally, the regulations provide that a full notice to the participant is not required on a regular periodic basis, and the full notice can be provided to the participant in connection with other materials

(such as a summary plan description) as long as the notice is updated to insure accuracy when the summary notice is provided. See Reg. 1.411(a)-11(c) (2) (iii)(B).

4.72.9.4.6 (03-01-2002)
Election Rules

- (1) Plan participants have the right to make a revocable election to waive a QJSA or a QPSA. See IRC section 417(a) (1).
- (2) IRC section 417(a) (2) provides, in general, that any waiver will not be effective unless the:
 - a. participant's spouse consents in writing to the election;
 - b. election designates a beneficiary which may not be changed without spousal consent (unless the spouse expressly permits designations by the participant without any further spousal consent);
 - c. election designates a form of benefit which may not be changed without spousal consent (unless the spouse expressly permits designations by the participant without any further spousal consent);
 - d. spouse's consent acknowledges the effect of the election; and
 - e. spouse's consent is witnessed by a plan representative or notary public.

Note: Sample language for spousal consent to a participant's waiver of a QJSA or QPSA is provided in Notice 97-10, 1997-1 C.B. 370.

- (3) In general, the election to waive the QJSA must be made within the 90-day period ending on the annuity starting date. See IRC section 417(a) (6) (A). See also, IRM 4.72.9.4.5.1.
- (4) The same types of requirements are applicable with respect to a QPSA, except that once the spouse consents to the participant's election not to receive the QPSA, the participant can change the form of the benefit without again getting the spouse's consent. Also, the participant's election period for waiving the QPSA is considerably longer.
 - a. The QPSA election period is defined at IRC section 417(a) (6) (B) and Reg. 1.401(a)-20, Q&A 33 as the period beginning on the first day of the plan year in which the participant reaches age 35 and ending on the date of death.
 - b. If a participant terminates service before reaching age 35, the election period begins on the date of separation from service.
 - c. If a plan allows a participant to waive the QPSA prior to age 35, the QPSA will be reinstated automatically as of the first day of the plan year in which the participant attains age 35. If the participant does not obtain the spouse's consent and waive the QPSA after this date, the spouse will receive a QPSA upon the participant's death. Following the death of the participant the spouse can waive the QPSA and receive an immediate annuity.

4.72.9.4.7 (03-01-2002)
**Fully Subsidized
Benefits**

- (1) A plan need not meet the election, consent and notice requirements if it fully subsidizes the QJSA, does not permit an election to waive the QJSA and does not permit a married participant to select a beneficiary other than his/her spouse. See IRC section 417(a) (5) and Reg. 1.401(a) -20, Q&A 37.
 - a. A plan may fully subsidize the QJSA, QPSA or both.
 - b. If the plan provides for either a fully subsidized QJSA or QPSA, but not both, the notice, election and consent requirements will still be applicable for the plan benefit which is not fully subsidized.
- (2) A fully subsidized QJSA is one in which there is no increase in cost to, or decrease in the actual amount received by, the participant resulting from the participant's failure to elect another form of benefit. A QJSA can never be considered fully subsidized if a lump sum distribution is one of the available optional payment methods under a plan, since a greater dollar amount may be paid out in the event of the early death of the participant and spouse. See Reg. 1.401(a) -20, Q&A 38.
- (3) A fully subsidized QPSA is one in which the amount of the participant's benefit is not reduced because the participant elects the QPSA coverage and there is no charge to the participant under the plan for the coverage. The regulations provide that a QPSA will always be fully subsidized in a defined contribution plan since these plans cannot provide for a reduction in the participant's benefits.

4.72.9.4.8 (03-01-2002)
**Examination
Steps**

- (1) Determine whether a plan otherwise subject to IRC section 417(a) is exempt from these requirements because it provides a fully subsidized QJSA and QPSA as described in IRC section 417(a) (5) and its regulations.
- (2) Review the explanation of the QJSA given to participants to determine whether the explanation was prepared in nontechnical language while still providing participants with enough facts to make an informed decision on the form of benefit selected.
- (3) Determine whether the plan provided this explanation no more than 90 days from the annuity starting date and no less than 30 days prior to the annuity starting date. If the plan provided the explanation after the annuity starting dates determine whether the required election period ended earlier than 30 days after the explanation was provided. Also, if the explanation was provided during a period that was less than 30 days before the annuity starting date determine whether the distribution took place more than 7 days after the explanation was provided and whether the other requirements in section 1.417(e)1(b) (2) (ii) were satisfied.
- (4) Determine whether the participant and spouse elected in writing to waive the QJSA not more than 90 days before the annuity starting date if a benefit is paid in a form other than a QJSA. Does the plan provide an adequate written waiver or have the participant and spouse made an adequate written election to waive the QJSA? If the explanation was

provided more than 90 days prior to distribution determine whether the participant was provided with a summary explanation, and provided with an opportunity to receive a full notice, within 90 days prior to the distribution.

- (5) Determine whether the spousal consent requirements outlined above were satisfied when a married participant is paid a benefit in a form other than a QJSA.
- (6) Determine whether a QPSA is being or will be paid to the surviving spouse (unless following the death of the participant the spouse waived the QPSA) or that an effective election waiving the QPSA was timely executed by the participant and consented to by the spouse when a participant dies prior to his annuity starting date.

4.72.9.5 (03-01-2002)

Definitions

- (1) This segment defines certain terms relating to QJSAs and QPSAs.

4.72.9.5.1 (03-01-2002)

Annuity Starting Date

- (1) Reg. 1.401(a)-20, Q&A 10 defines annuity starting date as the first day of the first period for which an amount is payable under a qualified plan as an annuity, or in any other form. However, Notice 93-26, 1993-1 C.B. 308, permits a plan administrator to treat the date of distribution as the annuity starting date in the case of distributions that are not in the form of an annuity and that are also not subject to the survivor annuity requirements.
- (2) This term is important initially because it distinguishes the period of time when the QPSA coverage ends and the QJSA coverage begins.
 - a. Before the annuity starting date, the spouse is protected by the QPSA coverage.
 - b. Once the annuity starting date is reached, the spouse is protected under the QJSA requirements.
- (3) The annuity starting date is also used to determine the notice and election periods for the QJSA.
 - a. A participant and spouse must be provided with notice of the right to select among optional forms of benefits, in lieu of the QJSA, during a period which is no less than 30 and no more than 90 days prior to the annuity starting date.
 - b. Also, if the participant and spouse decide not to receive the QJSA, an election by the participant and spouse must be made within a 90-day period ending on the annuity starting date.

Note: See the discussion at 4.72.9.4.5(2) for a discussion of situations involving a retroactive annuity starting date.

4.72.9.5.2 (03-01-2002)
Immediately Distributable

(1) An account balance is immediately distributable if any part of the account balance could be distributed to the participant (or surviving spouse) before the participant attains, or would have attained if not deceased, the later of normal retirement age or age 62. See Reg. 1.411(a)-11(c) (4).

4.72.9.5.3 (03-01-2002)
QJSA

(1) A QJSA is an annuity for the life of the participant with a survivor annuity for the spouse. The survivor annuity cannot be less than 50% nor more than 100% of the annuity which is payable during the joint lives of the participant and spouse and must be the actuarial equivalent of a single annuity for the life of the participant. See IRC section 417(b).

(2) A joint and survivor annuity is not a QJSA unless the plan permits the participant to start receiving a distribution in the form of a QJSA immediately after the participant has attained the earliest retirement age under the plan. See Reg. 1.401(a) -20, Q&A's 16 and 17.

a. The QJSA for married participants must be at least as valuable as any other form of optional benefit payable under the plan at the time of election. If a plan has more than one joint and survivor annuity that would satisfy the QJSA requirements, the more valuable joint and survivor annuity must be the QJSA.

b. A plan may also have more than one joint and survivor annuity which are actuarially equivalent. In such a case the plan must designate which one is the QJSA and therefore the automatic form of payment.

c. A plan may allow a participant to elect out of the QJSA to an actuarially equivalent joint and survivor annuity that meets the QJSA requirements without spousal consent. However, a participant does need spousal consent to elect a joint and survivor annuity which is not actuarially equivalent to the automatic QJSA.

4.72.9.5.4 (03-01-2002)
QPSA

(1) In a defined contribution plan, a QPSA is defined as an annuity that can be purchased with not less than 50% of the participant's nonforfeitable account balance on the date of the participant's death. If only 50% of the participant's account balance is used to purchase an annuity, the remaining portion of the account balance can be paid to other beneficiaries of the participant without the consent of the spouse. See IRC section 417(c).

(2) In a defined benefit plan, a QPSA is defined as a survivor annuity for the life of the surviving spouse. It is determined, in the case of a participant who dies—

a. after attaining the earliest retirement age under the plan, as if the participant had retired with a QJSA on the day before the participant's death; and

b. on or before the participant's earliest retirement age under the plan, as if the participant had separated from service on the date of death, survived until the earliest retirement age, retired at that time with a QJSA and died the day after.

- (3) In essence, the survivor portion of the QJSA is the QPSA in a defined benefit plan because the QPSA cannot be less than the survivor portion of the QJSA.

4.72.9.5.5 (03-01-2002)

Spouse

- (1) If a participant is married on the date of death payments of the survivor annuity must continue even if the spouse remarries. Additionally, if a participant dies after the annuity starting date, the spouse the participant was married to on the annuity starting date is still entitled to the survivor annuity unless this is changed by a Qualified Domestic Relations Order (QDRO) . If a participant divorces a spouse prior to the annuity starting date, the divorced spouse will still be entitled to the survivor annuity unless a QDRO provides otherwise or the participant changes his election or remarries. See Reg.1.401(a)-20 Q&A 25.
- (2) An optional one-year hold out rule provides, in general, that a plan is not required to treat a participant as married unless the participant and the participant's spouse have been married throughout the one-year period ending on the earlier of the participant's annuity starting date or the date of the participant's death. See IRC section 401(a) (11) (D) and 417(d).
- a. In *Enlow v. Fire Protection Systems, Inc.*, 803 S.W.2d 148 (Mo. App. 1991), the Missouri Court of Appeals found that a plan which did not specifically provide for the one-year rule could not deny the spouse's right to the survivor benefit even though the participant and spouse had not been married for one year at the time the participant died.
 - b. Reg. 1.401(a)-20, Q&A 25 explains how the one-year rule should work. The employer must treat a participant who is married at his annuity starting date as having been married for one year prior to the annuity starting date and provide the appropriate notice, election and consent information. If an election was made by the participant and spouse to receive a QJSA and the marriage subsequently ends, within a 12 month period following the date of the marriage, by either divorce or the participant's death, the plan may treat the affected participants as having not been married on the annuity starting date. In such a case, the plan may provide that the spouse loses any right to a survivor benefit. No retroactive correction of the amount paid to the participant is required under these circumstances.